

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

PARIS NICOLE SMITH,

No. 312481
Wayne Circuit Court
LC No. 12-000894-FC

Defendant-Appellant.

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right her convictions of attempted murder, MCL 750.91, arson - preparation to burn property with a value of \$20,000 or more, MCL 750.77(1)(d)(i), larceny with a value of more than \$1,000 but less than \$20,000, MCL 750.356(3)(a), and stealing or retaining a financial transaction device without consent, MCL 750.157n(1).¹ We affirm.

Defendant argues that the trial court abused its discretion in allowing deletion of a res gestae witness, Harvard Gardner, from the prosecution's witness list for good cause because of Gardner's health condition. We disagree. A trial court's decision to "permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion." *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003).

A res gestae witness is a witness to "some event in the continuum of the criminal transaction" and the witness' testimony would aid in the development of a "full disclosure of the facts at trial." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Both the Michigan legislature and this Court have made clear that "the prosecution must notify a

¹ Immediately before trial, defendant pleaded guilty to larceny with a value of more than \$1,000 but less than \$20,000, and stealing or retaining a financial transaction device without consent. Defendant was subsequently convicted, at the conclusion of the bench trial, of attempted murder and arson - preparation to burn property with a value of \$20,000 or more.

defendant of all *known* res gestae witnesses and all witnesses that the prosecution *intends to produce*.” See MCL 767.40a; *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). The prosecution also has a continuing duty to disclose res gestae witnesses as they become known. MCL 767.40a(2); *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995). The prosecution must provide to the defendant, “not less than thirty days before trial,” a list of witnesses the prosecution intends to call at trial. MCL 767.40a(3); *Burwick*, 450 Mich at 288. However, the prosecution can “add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.” MCL 767.40a(4). The standard of due diligence is applicable when a witness listed on the prosecution’s witness list cannot be located by the prosecution, and thus, the prosecution cannot produce that witness at trial. See *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000).

In this case, Gardner’s location was known, and the prosecution sought to excuse him as a result of his health condition. We conclude that the prosecution showed good cause to delete Gardner from its witness list. Our Supreme Court defined “good cause,” as used in MCR 6.006(C), as meaning a “satisfactory, sound, or valid reason.” *People v Buie*, 491 Mich 294, 319; 817 NW2d 33 (2012). Here, the prosecution waited through the weekend before the trial to be advised of Gardner’s condition, and Gardner’s doctors advised that he could not leave the house due to his condition – he was on oxygen and was suffering from cancer. Further, the prosecution was prepared to present witnesses to testify to these facts. Neither the lower court nor defendant requested testimony from these witnesses. The court determined that Gardner’s testimony was not crucial to the defense and excused his absence. The court made this determination after considering defendant’s argument regarding the information she hoped to derive from Gardner. Defendant made the same argument she now makes – that Gardner could testify about the joint owners and beneficiaries of the Dearborn Federal Credit Union account and the change of beneficiaries. The court determined that this information could be elicited from other witnesses. Specifically, the other joint owners of the account, the beneficiaries on the account, and the account documentation could be presented and would be sufficient to establish defendant’s alternative motive theory. The court did not abuse its discretion in excusing Gardner’s absence due to his health condition because defendant was still able to present sufficient evidence regarding the account owners and beneficiaries, and thus, potential alternative motives for the attempted murder and attempted arson.

Further, in order to prove an abuse of discretion, and regardless of whether the prosecution established good cause, defendant must show that she was prejudiced by the trial court’s decision. See *Callon*, 256 Mich App at 328. Here, defendant cannot show prejudice and, thus, cannot show an abuse of discretion. As discussed above, not only did the prosecution provide a valid reason for Gardner’s absence, but defendant was not deprived of the right to present her defense. Three other witnesses, Sheila Black Miller, Dwayne Williams, and Nancy Gardner, who were either joint owners or beneficiaries on the Dearborn Federal Credit Union account, were present at trial to testify regarding the account. Because defendant was still able to

provide evidence of her alternative motive theory, she was not prejudiced by the trial court's decision to delete Gardner from the prosecution's witness list; thus, the trial court did not abuse its discretion.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad